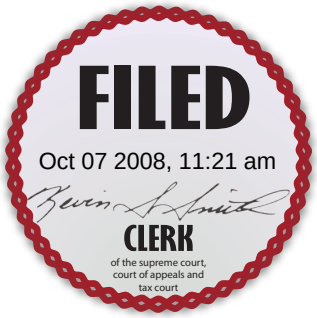

ATTORNEY FOR APPELLANT:

CHRIS P. FRAZIER
Marion County Public Defender Agency
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

ZACHARY J. STOCK
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

DESMOND TURNER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0802-CR-117
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert Altice, Judge
Cause No. 49G02-0606-FD-107695

October 7, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Desmond Turner appeals his convictions, after a trial by jury, of battery by bodily waste, as a class D felony; intimidation, as a class D felony; and resisting law enforcement, as a class A misdemeanor.

We affirm.

ISSUES

1. Whether the trial court erred when it denied Turner's motion for a directed verdict on the intimidation charge.

2. Whether the trial court erred when it denied Turner's motion for change of venue.

FACTS

On June 12, 2006, Turner was an inmate in the Marion County Jail, and jail authorities determined that he should be relocated to the disciplinary cellblock. While Turner was meeting with his attorney, his belongings were transferred to his assigned new cell. After Turner's meeting, and while being accompanied by Marion County Sheriff's Department deputies Clairmont and Phillips, Deputy Bostock informed Turner that he was being relocated and would be taken to the new cell. Turner said, "I ain't moving. F*** that." (Tr. 113).

Bostock repeatedly advised and then ordered Turner to accompany them to his new cell. Turner, restrained in leg shackles and belly chains, refused to move. Bostock and Clairmont each took one of Turner's elbows to escort him. Turner jabbed his elbows and twisted his torso in an effort to break free, and then went limp – requiring the officers "to take his full body weight." (Tr. 116). When they arrived at Turner's new cell, Turner

still would not move himself or cooperate in kneeling onto the bed to allow the removal of his leg shackles. Turner continued to flail about, and "wrapped his leg shackles around" the cell toilet. (Tr. 205).

It required all three officers to hold Turner in order to remove the leg shackles. The officers backed out of the cell, and Bostock "asked [Turner] to back up to the cell door so [the officers] could remove his belly chains." (Tr. 123). Turner backed farther away and told them to "leave these f***ing chains on." (Tr. 209).

The officers left to perform other duties, and Turner's noncompliance was reported. They returned and, as directed by his superior, Bostock informed Turner that "his belly chains and handcuffs would remain on until he was ready to comply or come to the bars" for their removal. (Tr. 126). Turner yelled,

> [F]*** that. I know how this is going to go. I know how this is gonna' go down. You bitches ain't getting shit off me. You're going to have to come in here and take these off me.

(Tr. 126). Turner then yelled, in a loud and angry tone,

> Bostock, I'm going to kill you and your whole damn family. You don't know who you're messing with.

(Tr. 127).

Bostock proceeded to perform other duties on the cellblock. As Bostock passed Turner's cell, Turner spat at him. Turner's saliva struck Bostock's left check and eye.

Two days later, on June 14, 2006, the State charged Turner with battery by bodily waste, as a class D felony; intimidation, as a class D felony; and resisting law enforcement, as a class A misdemeanor. On November 7, 2007, Turner filed a motion

for change of venue for the trial scheduled to begin on November 24, 2007. His motion asserted that the voluminous media coverage since June of 2006 concerning the killing of a seven-member family and "Turner's alleged involvement in these homicides" would prejudice the prospective jury pool and warranted a change of venue. (App. 87). The trial court took the motion under advisement.

On November 29, 2007, the trial court convened a jury trial. After voir dire, the transcript of which has not been provided by Turner, the trial court denied Turner's motion for a change of venue. The trial court noted that it had taken the motion "under advisement pending jury selection," and that during voir dire, "only three people . . . actually recognized who Mr. Turner was," and "none of those three actually really knew the facts of this case." (Tr. 40).

Bostock and the other two officers testified that Turner had used Bostock's name, specifically directed the threats to Bostock, and that his tone of voice was loud and angry as he was issuing the threats. Deputy Phillips characterized Turner's tone as "abusive" when he yelled, "Bostock, I'm going to kill your whole f***ing family," after Bostock had "told him that the chains were going to remain on." (Tr. 212, 213).

After the State concluded its presentation of evidence, Turner moved for a directed verdict "with regard to the intimidation charge," asserting that there was "no evidence that the threats were made in retaliation or to intimidate these officers[1] to do something or not to do something." (Tr. 293). The trial court denied the motion.

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[1] The information alleged that Turner "did communicate to . . . Bostock, a law enforcement officer, a threat to . . . kill . . . Bostock and the family of . . . Bostock . . . ." (App. 32-33). Similarly, the jury was

The jury returned verdicts finding Turner guilty of all three charges. The trial court ordered Turner to serve concurrent sentences, for an aggregate term of three years.

DECISION

1. Motion for Directed Verdict

We have recently explained that

> for a trial court to appropriately grant a motion for a directed verdict, there must be a total lack of evidence regarding an essential element of the crime, or the evidence must be without conflict, and susceptible only to an inference in favor of the innocence of the defendant. If the evidence is sufficient to sustain a conviction upon appeal, then a motion for a directed verdict is properly denied.

Edwards v. State, 862 N.E.2d 1254, 1262 (Ind. Ct. App. 2007), *trans. denied*. Accordingly, our standard for reviewing the denial of a motion for a directed verdict

> is essentially the same as that upon a challenge to the sufficiency of the evidence. We neither reweigh evidence nor judge witness credibility, but consider only the evidence that supports the conviction and the reasonable inferences to be drawn therefrom in order to determine whether there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt.

Id.

To support a conviction for intimidation, the State must "show that the defendant: (1) communicated a threat; (2) to another person; (3) with the intent that the other person be placed in fear of retaliation for a prior lawful act." *Johnson v. State*, 743 N.E.2d 755, 757 (Ind. 2001) (citing Ind. Code § 35-45-2-1). The offense is a class D felony "if the

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instructed that the State was required to prove beyond a reasonable doubt that "Turner communicated a threat to . . . Bostock . . . ." (App. 168).

person to whom the threat is communicated . . . is a law enforcement officer. Ind. Code § 35-45-2-1(b)(1)(B).

Turner argues that the trial court erred in denying his motion for a directed verdict on the intimidation charge. Specifically, he argues that his "threats to Deputy Bostock" were of the same nature as his other "angry, abusive language" during the relocation period and should not "have been taken seriously" as a specific threat to Bostock. Turner's Br. at 7. Such argument appears to ask that we reweigh the evidence presented, which we do not do. *See Edwards*, 862 N.E.2d at 1262.

Turner did not want to be moved to a new cell – objecting verbally and by refusing to cooperate physically. The decision to relocate Turner was made by jail authorities, and the evidence established that Bostock was performing his law enforcement duties in effecting the move of Turner. After Bostock had accomplished the relocation, Turner continued to verbally object and refused to cooperate in the removal of his restraints – restraints that, as the State notes, "any prisoner would gladly cast off." State's Br. at 5. Turner then addressed Bostock by name, "calling [him] out by [his] last name," as Bostock testified, and threatened to kill Bostock and his family. (Tr. 127). Further, Turner's threats were expressed in a loud and angry tone, and he spat at Bostock. This evidence is sufficient to support the inferences that the threats to Bostock were serious and were specifically meant for Bostock.

We find that substantial evidence of probative value supports the conclusion that Turner committed the offense of intimidation, as a class D felony. Therefore, the trial court did not err in denying Turner's motion for a directed verdict.

2. Motion for Change of Venue

A defendant "is entitled to a change of venue upon showing the existence of prejudicial publicity and that jurors will be unable to disregard preconceived notions of guilt and render a verdict based upon the evidence." *McCarthy v. State*, 749 N.E.2d 528, 537 (Ind. 2001) (emphasis added). A trial court's denial of a motion for a change of venue will be reversed only for an abuse of discretion. *Id.* "Showing potential exposure to press coverage is not enough." *Id.*; *see also Johnson v. State*, 749 N.E.2d 1103, 1106 (Ind. 2001). Rather, the defendant "must demonstrate that the jurors were unable to disregard preconceived notions of guilt to render a verdict based on the evidence." *McCarthy*, 749 N.E.2d at 537. A trial court does not abuse is discretion in denying a change of venue "where there is no showing that jurors are unable to set aside preconceived notions of guilt and render a verdict based upon the evidence." *Id.*

Turner argues that the trial court abused its discretion by denying his request for a change of venue from Marion County. He directs our attention to the exhibits he attached to his motion, reflecting publicity about the incident giving rise to the seven murder charges pending against him. According to Turner, this "publicity in the pending murder case undoubtedly extended to the instant case and prevented him from having a fair trial." Turner's Br. at 9. Turner cites our Supreme Court's holding in *Ward v. State*, 810 N.E.2d 1042, 1049 (Ind. 2004), *cert. denied* 546 U.S. (2005), and claims that his exhibits reflect prejudicial pretrial publicity that necessitates a change of venue, as was found to be warranted in *Ward*.

Ward involved a brutal slaying in a small close-knit community of approximately 20,000 residents; questionnaires 28 pages long were answered by 128 prospective jurors; voir dire of more than sixty potential jurors was conducted. The analysis leading to the result in *Ward* flowed from a review of these questionnaires and the voir dire transcript. However, the record before us leaves us unable to undertake the analysis performed in *Ward*.

Turner's exhibits of publicity simply show "potential juror exposure," which "is not enough" to establish that the trial court abused its discretion. *Johnson*, 749 N.E.2d at 1106. Turner has not provided a transcript of voir dire. Hence, we have no evidence of, nor has Turner shown, that jurors either had any "preconceived notions of [Turner's] guilt" or that they were "unable to disregard" such and render a verdict based solely on the evidence presented on the charges in this case. *McCarthy*, 749 N.E.2d at 528. Accordingly, we conclude that Turner has failed to establish that the trial court abused its discretion when it denied his motion for a change of venue.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.